

No. 15505

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK L. SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JUN 17 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Portland 5, Oregon,

For Appellee.

In the United States District Court for the
District of Oregon

Civil No. 8456

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK L. SMITH,

Defendant.

COMPLAINT

Comes now the United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, acting under direction of the Attorney General of the United States, and for cause of action against the above-named defendant complains and alleges:

I.

That this is a Civil action brought by the United States of America pursuant to Section 1345 of Title 28, U. S. C.

II.

That the defendant, Frank L. Smith, is a resident of the State and District of Oregon.

III.

That pursuant to the first proviso of Section 2 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 902 (e)), Defense Supplies Corporation and its successor, Reconstruction

Finance Corporation, conducted, at the times herein mentioned, a meat subsidy program under which certain subsidy payments were made to qualified livestock slaughterers. The basic regulations which established the terms and conditions under which such subsidy payments were to be made during the periods involved in this complaint are Reconstruction Finance Corporation's Livestock Slaughter Payments Regulation No. 3 (8 F. R. 10826), effective June 7, 1943, Revised Regulation No. 3 (10 F. R. 4241), as amended, effective January 19, 1945, and Office of Economic Stabilization Directive 41 (10 F. R. 4494), as amended, effective April 24, 1945.

IV.

That as an incident of the meat subsidy program, on June 25, 1951, the Reconstruction Finance Corporation issued its denial from the Debtor's protest, a certified copy of which is annexed hereto as Exhibit "A," invalidating defendant's subsidy claims in the total amount of \$29,244.74 which were paid upon preliminary approval only.

V.

That Section 7 (b) (2) of Directive 41 of the Office of Economic Stabilization and amended by Amendment No. 2 effective January 28, 1946, (11 F. R. 1215, 32 C. F. R. (1946 Supp.) p. 5069) provided that subsidies shall be withheld upon the certification of the Office of Price Administration that it was determined in a court of first instance or by a hearing commissioner, that the slaughterer had violated a price regulation. Upon receipt of such certifi-

cation, and in accordance with the implementing Section 7003.10 (a) (2) of Revised Regulation No. 3 as amended by Amendment No. 15, Reconstruction Finance Corporation invalidated the claims for the reporting periods covered by the certification, June, July, and August, 1945, which had previously been paid upon preliminary approval only in the amount of \$37,839.67 and required restitution thereof. By set-off, \$9,528.59 was credited to the debtor's account reducing the principal amount of his indebtedness to the plaintiff to \$29,244.74.

VI.

That the plaintiff has made repeated demands upon the defendant for the payment of the claims justly due and owing the plaintiff in the sum of \$29,244.74, together with interest from the dates of payment at the rate of 4 per cent per annum. Defendant refused and continues to refuse to pay said debt.

Wherefore, the plaintiff demands judgement in the sum of \$29,244.74 and interest from the dates of payment to the date of judgement at the rate of 4 per cent per annum, together with interest and costs of suit.

C. E. LUCKEY,

United States Attorney for
the District of Oregon;

/s/ THOMAS B. BRAND,

Assistant United States
Attorney.

EXHIBIT A

Reconstruction Finance Corporation
Washington

Certificate

Pursuant to the provisions of Section 1733 (b), Chapter 115, Title 28 of the United States Code, as amended,

I, M. W. Knarr, Assistant Secretary of Reconstruction Finance Corporation, a corporation created and existing pursuant to the Reconstruction Finance Corporation Act, approved January 22, 1932 (47 Stat. 5), as amended [successor to Defense Supplies Corporation, pursuant to Joint Resolution approved June 30, 1945 (59 Stat. 310)] do hereby certify that the annexed photostatic page is a true and correct copy of a file copy of a letter dated June 25, 1951, from Leo Nielson, Secretary, to Mr. Frank L. Smith, 8349 North Vancouver Avenue, Portland, Oregon, Re: Meat Subsidy LS-1855-M, on file in the Washington Office of Reconstruction Finance Corporation; and in my custody as part of the official records of Reconstruction Finance Corporation.

In Witness Whereof, I have hereunto set my hand and caused the seal of Reconstruction Finance Corporation to be affixed at Washington, D. C., on this 26th day of April, 1954.

[Seal] /s/ M. W. KNARR,
Assistant Secretary Reconstruction Finance Corporation.

cc: Mr. Carroll
Mr. Rutland
Mr. Horwitz
Mr. Crandall
Mr. Ronan
Mr. Bynum
Mr. Hersh
Mr. Brown
Mr. Wise
Mr. Doherty
Mr. George Fruit, Dept. of Justice.

June 25, 1951

Mr. Frank L. Smith
8349 North Vancouver Avenue
Portland, Oregon

Re: Meat Subsidy
LS-1855-M

Dear Mr. Smith:

This is with further reference to your telegram of December 15, 1950, which was filed as a protest under Regulation No. 11 of RFC. Your protest requests a review of your claims for May, June, July and August, 1945, aggregating \$37,839.67, and for June, 1946, in the amount of \$13,815.22.

The OPA certified to RFC that, in a Hearing Commissioner's Proceeding, it was determined that you had violated Control Order No. 1 by slaughtering in excess of your quotas during the months of

June, July and August, 1945. Upon receipt of this certification, RFC was required, under the provisions of Section 7 (b) (2) of Directive 41 of the Office of Economic Stabilization, to invalidate your claims for the months of June, July and August, 1945. The directive was mandatory and does not permit this agency to exercise any discretion in its application. Consequently, it is our determination that your June, July and August, 1945, claims, aggregating \$37,839.67, were properly invalidated. Your protest indicates that the payment made on your May, 1945, claim was also charged back to your account. The OPA certification invalidated your claims only for the months of June, July and August, 1945, in the amount of \$37,839.67. Your May, 1945, claim was processed and paid in accordance with the provisions of the meat subsidy regulation.

Your June, 1946, cattle claim, which called for a net payment of \$9,528.59, was paid by application to our claim against you. You were notified of this action on August 13, 1948. The balance of \$29,244.74 due on our claim against you has been referred to the Department of Justice for collection.

This should be considered a formal and final denial of your protest from which appeal lies only to a court having jurisdiction over such matters.

Very truly yours,

/s/ LEO NIELSON,
Secretary.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint herein denies each and every allegation, thing and matter in said complaint contained and the whole thereof, except defendant admits that he is a resident of the State and District of Oregon.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by its complaint.

/s/ RALPH R. BAILEY,
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed March 15, 1956

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSION
OF FACTS AND AUTHENTICITY OF
DOCUMENTS

Comes now the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 36 and 37 (c) of the Federal Rules of Civil Procedure, hereby requests admission

by the defendant of the following facts, within 10 days after service upon it of this request:

1. That Frank L. Smith, during the Years 1945 and 1946, was a slaughterer of livestock doing business in and around the State and District of Oregon.

2. That during the Years 1945 and 1946, Frank L. Smith received subsidy payments from the United States, acting by and through the Office of Defense Supplies and the Reconstruction Finance Corporation, pursuant to the Emergency Price Control Act of 1942, the Reconstruction Finance Corporation Livestock Slaughtering Payments Regulation No. 3, as amended, and the Office of Economic Stabilization Directive No. 41, as amended.

3. That on or about May 27, 1946, a certain hearing was held by the Office of Price Administration, in which it was alleged that Frank L. Smith had violated control Order No. 1 by slaughtering in excess of his quota during the Months of May, June, July and August of 1945.

4. That the Commissioner, at the said hearing, concluded that Frank L. Smith had violated the said Control Order No. 1 by slaughtering in excess of his quota during the Months of June, July and August of 1945.

5. That a claim receivable was prepared by certain agencies of the United States, stating that as a result of such finding, the sum of \$37,839.67 was due and owing the United States from the said Frank L. Smith.

6. That a copy of the said claim receivable was received by Frank L. Smith.

7. That on or about December 15, 1950, the said Frank L. Smith protested, pursuant to Regulation No. 11 of the Reconstruction Finance Corporation, against the finding of the Office of Price Administration Hearing Commissioner and the claim receivable alleged against him by the United States.

8. That the United States denied the protest and advised Frank L. Smith, by letter dated June 25, 1951, a copy of which has been furnished defendant as Exhibit A attached to the complaint herein, that an appeal could be had only by court action, in a court having jurisdiction over such matters.

9. That Frank L. Smith received the said Exhibit A and that the copy attached to the complaint herein is genuine.

10. That the said Frank L. Smith did not, after receipt of the letter dated June 25, 1951, make any further protest to the Office of Defense Supplies, to Reconstruction Finance Corporation, or to any other federal agency.

11. That the said Frank L. Smith did not, after receipt of the said letter dated June 25, 1951, nor has he ever since that time, appealed the decision to any court of the United States.

12. That no payment to the United States or to any of its agencies has ever been made by Frank L.

Smith on account of the said claim set forth in the letter of June 25, 1951.

C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States
Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed March 26, 1956.

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S REQUEST FOR
ADMISSION OF FACTS AND AUTHEN-
TICITY OF DOCUMENTS

Comes now defendant and for answer to plaintiff's request for admission of facts and authenticity of documents, replies as follows:

1. Admits statement No. 1.
2. Admits statement No. 2.
3. Admits statement No. 3.
4. Denies statement No. 4.
5. Defendant has no knowledge at this time upon which to deny or affirm statement No. 5.
6. Denies statement No. 6.
7. Admits that defendant protested at all times any indebtedness to the United States.

8. Denies statement No. 8.
9. Denies statement No. 9.
10. Denies statement No. 10.
11. Admits said statement except to the extent that this suit is an appeal to a court of the United States.
12. Admits statement No. 12.

State of Oregon,
County of Multnomah—ss.

I, Frank L. Smith, being first duly sworn, depose and say that I am the defendant in the above-entitled action; and that the foregoing Answer to Plaintiff's Request for Admission of Facts and Authenticity of Documents is true as I verily believe.

/s/ FRANK L. SMITH.

Subscribed and sworn to before me this 4th day of May, 1956.

[Seal] /s/ BETTY J. WILLIAMS,
Notary Public for Oregon.

My Commission Expires: 9-6-58.

Service of copy acknowledged.

[Endorsed]: Filed May 4, 1956.

[Title of District Court and Cause.]

VERDICT

We, the Jury duly empaneled and sworn to try the above-entitled cause, under the direction of the Court, do find our verdict in favor of the defendant and against the plaintiff.

September 20, 1956.

/s/ MONTIE BRICKELL,
Foreman.

[Endorsed]: Filed September 20, 1956.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR
JUDGMENT FOR PLAINTIFF

Comes now the plaintiff, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, respectfully moves the Court for an order setting aside the verdict heretofore rendered and for judgement in favor of plaintiff, in accordance with the plaintiff's motion for a directed verdict.

In support hereof, plaintiff refers the Court to the pleadings, including plaintiff's requests for

admissions and defendant's responses thereto, the testimony of Frank L. Smith, the exhibits introduced by plaintiff on trial, and the attached memorandum of points and authorities.

Dated this 26th day of September, 1956.

C. E. LUCKEY,
United States Attorney,
District of Oregon.

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed September 26, 1956.

In the United States District Court
for the District of Oregon

Civil No. 8456

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK L. SMITH,
Defendant.

JUDGMENT

This cause having come on regularly for trial on the 21st day of September, 1956, before the under-

signed Judge of the above-entitled court, plaintiff appearing by Mr. Thomas B. Brand, Assistant United States Attorney, defendant appearing in person and by Mr. Walter J. Cosgrave and Mr. H. Kent Holman, his attorneys; a jury having been duly empaneled and sworn and having heard the opening statements of counsel and the evidence adduced on behalf of the parties, and both parties having rested, and the defendant having moved the court for a directed verdict in his favor and it appearing to the court that said motion should be allowed; the court thereafter directed the jury to return its verdict in favor of the defendant and against the plaintiff, which verdict was returned by the jury in favor of the defendant and against the plaintiff, was received by the court and entered of record, said verdict being in words and figures as follows:

“We, the Jury duly empaneled and sworn to try the above-entitled cause, under the direction of the Court, do find our verdict in favor of the defendant and against the plaintiff.

“September 20th, 1956.

“MONTIE BRICKELL,
“Foreman.”

Now, Therefore, based upon said verdict, it is

Considered, Ordered and Adjudged that plaintiff take nothing and that judgment be entered against plaintiff and in favor of defendant.

Dated this 20th day of September, 1956.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed September 28, 1956.

[Title of District Court and Cause.]

MOTION

Comes now the plaintiff, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 50 and 59, Federal Rules of Civil Procedure, and as an alternative to plaintiff's Motion to Set Aside Verdict and for Judgment for Plaintiff previously filed in this court and cause, respectfully moves the court for an order for a new trial.

Dated: October 1, 1956.

C. E. LUCKEY,
United States Attorney,
District of Oregon,

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1956.

[Title of District Court and Cause.]

ORDER

This matter having come on to be heard on plaintiff's motion for an order to set aside the verdict heretofore entered, and for a judgment in favor of the plaintiff, notwithstanding the verdict, and in the alternative for a new trial, and the Court being fully advised and it appearing to the Court that said motion should be denied,

Now, Therefore, the motions of plaintiff for judgment notwithstanding the verdict and for a new trial be and the same hereby are denied.

Dated this 5th day of November, 1956.

/s/ WILLIAM G. EAST,
Judge.

Service of Copy acknowledged.

[Endorsed]: Filed November 5, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Frank L. Smith, Defendant, and Maguire, Shields, Morrison & Bailey and Walter J. Cosgrave and H. Kent Holman, Attorneys for Defendant:

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to

the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 28th day of September, 1956, in favor of the defendant and against the plaintiff and from that Order entered November 5, 1956, herein denying plaintiff's motions for judgment notwithstanding the verdict, and for an order setting aside the verdict and for judgment for plaintiff, and for a new trial.

C. E. LUCKEY,
United States Attorney,
for the District of Oregon,

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

[Endorsed]: Filed January 2, 1957.

United States District Court,
District of Oregon
Civil No. 8456

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK L. SMITH,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East,
U. S. District Judge.

September 20, 1956—10:00 A.M.

Appearances:

TOM B. BRAND,
Attorney for Plaintiff.

WALTER COSGRAVE,
Attorney for Defendant.

The Court: The Government's opening statement.

Mr. Brand: If the Court please, Ladies and Gentlemen. I stand before you in some fear and apprehension in connection with this matter. You all indicated that during the war and after the war in connection with your relationships with the various Governmental agencies for handling price control and price regulations, that your connections were not such that you had any feeling of prejudice or animosity against the Government. I was in school, high school at the time, and in the service shortly thereafter, and at college immediately after I served, so I had no real connection at all with the O.P.A. or the O.P.S. either, and yet I remember a distinct feeling of animosity and prejudice toward the Governmental agencies.

They seemed to be bureaucratic, they seemed to be ignorant, and they seemed to be very foolish. And I am now in the position of standing before you and attempting to defend one of those Governmental agencies in connection with a matter which happened about ten years ago.

I think for the most part the price-control regulations worked reasonably well. Prices were held in line fairly well during the war, and I am told that the situation during the second World War was very much better than it was during the first. In any case, I give the people that were working on the boards credit for thinking they were [2*] right. And now, looking back then, just as I have tried to disabuse my feeling toward the Government bureaucrats, and I am myself one, I am sure you will do the same. The situation briefly is this. Mr. Smith was in the business of packing and slaughtering cattle. During the two years in which we are particularly interested, 1945 and '46, he had been in business for some time. Now, when the war developed and it appeared that it was going to be necessary to put control on prices, the Government had to make some arrangements for keeping middlemen going, and in the meat business the procedure was this: Prices were controlled, as you will recall, more or less controlled at least, for the retail prices of meat. However, the cattlemen themselves did not have a specific price ceiling upon heads of cattle. Therefore, in order to keep the middlemen, the distributor in business, the Government worked out a plan whereby the middleman or supplier could keep going to prevent him from being squeezed out by rising prices in cattle and stable prices in meat, and since speed was obviously necessary in order to keep the meat packers going, the meat packers, Smith,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

claimed for each month showing how many head of cattle were slaughtered, and the type of cattle, the grade, and what have you.

There were probably literally thousands of forms filled out by just one slaughterer, if he did anything [3] extensive, and you can imagine all the slaughterers in this area handing the A.P.O.—or, the O.P.A. their forms. Regulation provided that the Government would pay those subsidies upon the claims made by the slaughterer immediately, and in the normal course of business when the slaughterer had met his quota for a period, he would usually get his pay some time in June or July.

This procedure, at least, kept the meat going to the retail stores so it could be purchased. Naturally, the Government had to work out some kind of an arrangement whereby they could protect themselves, and so the regulations provided that while money was paid practically immediately, nevertheless the Government could come back at subsequent times to check these records over and make sure that they were arithmetically correct, and all the multitudinous records were kept at the meat slaughterers, and also provided that in the event that there was a violation of some price regulations or any of the other regulations set up during the war for the purpose of controlling prices or controlling products or what have you, then under those circumstances a subsidy payment could be declared invalid; if it was declared invalid, then the Government acting through the Reconstruction Finance Corporation could make a demand upon the slaughterer saying

in effect, you either did not keep your records properly or you were charged with violating [4] some regulation or other, and you owe us so much money.

Now, in the case of Mr. Smith, it will appear that Mr. Smith in a hearing before an O.P.A. commissioner was charged with violating an order called Control Order Number 1, and the net result of that was, it was found and determined by the hearing commissioner that he had violated that order, and the Reconstruction Finance Corporation declared that an invalid subsidy was paid to Mr. Smith for the three months of June, July, and August, 1945.

A demand was made by them upon Mr. Smith to repay that money, and there then developed various administrative appeals, and what have you, the net result being that Mr. Smith did not pay the money back to the Government, and the Government at this time is suing Mr. Smith to recover those subsidy payments.

Thank you.

Mr. Cosgrave: May it please the Court and Members of the Jury. I don't think that any of you will have any feeling against those bodies that did handle the price regulations during the war. I think that all of you will realize, I think all of you do, that it was a necessary job, sometimes a very distasteful job. At times there might have been rather unreasonable regulations pertaining to meat or other articles, but as they used to say during the war, it

was just one of the things we had to put up [5] with. So, I would ask that you have no feeling against those boards at all. But, here is a case where the Government is coming in and trying to get back some money which, as Mr. Brand says, was paid to him so that there could be meat on the shelves in the butcher shops. That's what it amounts to. The price of meat was fixed. You couldn't raise it, it was an offense to sell meat at over that price, and yet the cattlemen wouldn't sell their beef to the slaughterer at the price that the slaughterer could pay, so the Government said, well, instead of raising the price of meat, we will pay subsidies, and I think you will find that there was no real—no violation here by Mr. Smith. They had certain quotas, as you and I all know, and you will find that he has stuck closely to those quotas that he had, and that he was told in this one month, June, that's involved here, that he could kill 20 per cent more than the quota in that month, and that's what he did kill, 20 per cent more. And I think the file of the office of Price Administration approved that and said just send in your figures and we will—we are approving it for these three months, June, July, and August, the three months involved here.

Now, during the maze of directives and boards and such, I think you will find that there were something like—with respect to this, 1,454 directories and they came from 19 different Governmental agencies. And later on, [6] after this took place and the meat was plentiful, they said to Mr. Smith, you are not entitled to that extra 20 per cent. Techni-

cally, according to the law, you went over your quota and you're just stuck for that amount, the difference between what you paid the cattle raiser for your beef and what you could sell it for, and there is a technicality why you can't keep that money. We have got to have that money back.

Well, I think what we will bring before you here is that the Government says that they sent Mr. Smith a notice that he owed that money and that he didn't proceed as he should, and that thereafter, now, he just owes the money and that he can't have a hearing on these other matters. Well, I think you will find that there is no violation here. If you look at this thing, I think you will find that the Government didn't comply with these strict regulations themselves which they are insisting that Mr. Smith comply with, and I think you will find there is no right here for the Government to recover this amount from Mr. Smith. You understand that this happened—this isn't a claim for any offense that Mr. Smith was guilty of. The Government claims that well, according to District Rules, this mistake was made back there and we feel, although we approved it, that that wasn't quite the regulation.

Now, we have got to take all that into account [7] and I think you will find that there was an actual directive stating what he had done and telling him just to send in the data with respect to that. I think you will find that there was no ground here on which the Government should be allowed to recover this large amount from Mr. Smith.

Thank you.

The Court: The Government's first witness?

Mr. Brand: The Government will call Mr. Frank L. Smith. [8]

FRANK L. SMITH

the defendant herein, was called in behalf of the plaintiff as an adverse witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brand:

Q. Mr. Smith, were you during the years 1945 and '46—your Honor?

The Court: You may approach the witness.

Q. (By Mr. Brand): I mumble, Mr. Smith, so if you don't hear the questions, you just speak up. O.K.? In 1945 and 1946 were you a meat slaughterer doing business in Portland, Oregon? A. Yes.

Q. Did you, during that period, receive meat subsidies from the United States Government?

A. Did I get—

Q. Did you get the meat subsidies—did you get money from the Government for meat?

A. We got subsidy money as we called it, yes.

Q. All right, fine. Was there ever a hearing, Mr. Smith, in March of 1946, at which you were accused of violating the price regulation—

A. How was that?

Q. Were you accused of violating a price regulation in 1946; was there a hearing? [9]

A. Yes, I think so.

Q. Do you remember what the outcome of that

(Testimony of Frank L. Smith.)

hearing was, Mr. Smith? A. Nothing.

Q. Was there any determination made; did anybody ever tell you that you had violated the price regulations?

A. The only thing they done was they didn't give me my subsidies, that's about all.

Q. Did you after that hearing get a letter or an order from Reconstruction Finance Corporation saying that you owed them twenty-nine-some thousands dollars because you violated the price regulations?

A. No.

Q. Has the Government ever made a claim against you for about \$37,000? A. No, sir.

Q. They never have? A. No.

Mr. Brand: I ask that this sheaf of documents be marked for identification Plaintiff's Exhibit 2 from the pretrial order.

(Documents referred to were marked Plaintiff's Exhibit 2 for identification.)

Mr. Cosgrave: Mr. Brand, there is no question about any of these, we will stipulate that—I mean, anything [10] you want with respect to those.

Mr. Brand: Are you stipulating that Frank L. Smith sent the wire dated December 15, 1950, to Leo Neilson?

Mr. Cosgrave: Yes, it was sent by his attorney, I think. Yes, it was taken from our office. There is no question about it.

Mr. Brand: And also did Mr. Smith also prepare an affidavit or sign an affidavit dated Decem-

(Testimony of Frank L. Smith.)

ber 23, 1946, the first paragraph of which says: "It was determined by the opinion and order of Hearing Commissioner Milton Koss, entered on 27 May, 1946, a copy which is attached, that your petitioner had violated the provisions of Section 10 (a) of Control Order 1 with respect to the——"

Mr. Cosgrave: We made photostatic copies of that; we have no objection.

The Court: Well, let's have them marked.

Mr. Brand: The plaintiff offers Exhibit 2.

The Court: I take it there is no objection?

Mr. Cosgrave: No objection, your Honor.

The Court: They will be received. Either counsel may read any portion of the documents to the jury at any time.

Mr. Cosgrave: Very well, your Honor.

(Whereupon, documents previously marked Plaintiff's Exhibit 2 for identification were received in evidence.) [11]

Mr. Brand: I ask that this document be marked Plaintiff's Exhibit 1 for identification.

(Whereupon, document referred to was marked Plaintiff's Exhibit 1 for identification.)

(Document handed to witness.)

Q. (By Mr. Brand): Mr. Smith, I hand you—or, the Clerk handed you Plaintiff's Exhibit 1. Will you examine that letter, please, and tell me if you have ever seen it before? A. Which is——

(Testimony of Frank L. Smith.)

Mr. Cosgrave: Well, if the Court please, that's the letter that has already been inquired about, and the man said he didn't receive it.

Mr. Brand: This is a letter dated June 25, 1951, a copy of which is attached to the Complaint. I have asked no questions about it previously. I didn't mean to, I apologize.

Mr. Cosgrave: I think you did.

The Witness: No.

Q. (By Mr. Brand): Do I understand, Mr. Smith, you have never seen that letter before?

A. No. No; what year is this?

Q. June 25, 1951? A. No.

Q. You never got that letter? [12]

A. I don't know nothing about it. Every single thing that I got was sent to Mr. Bailey's office, any mail of this kind was mailed right to him.

The Court: Did the jury hear the answer?

Mr. Holman: Repeat it, please.

The Witness: It went to Mr. Bailey's office. Everything was sent right to him, anything that had anything to do in regard to that was sent to him.

Q. (By Mr. Brand): Mr. Bailey from the firm of Maguire, Shields, Morrison & Bailey?

A. Yes, that's right.

Q. And that is the firm that is representing you by Mr. Cosgrave and Mr. Holman?

A. Yes, same firm.

Q. In October of 1951, Mr. Smith, did you get a letter from the United States Attorney for Oregon,

(Testimony of Frank L. Smith.)

in which the statement was made that you owed the Government about \$29,000; do you remember receiving that letter? A. No, sir.

Q. When was the first time that it came to your attention that the Government denied your protest of your December, 1950, telegram, a copy of which I showed you previously; when did you first find that out that that was denied?

A. Well, when first I found out that they didn't allow it, that was the first we found out; now, whatever the date [13] was, '44, whatever day it was when they didn't give it to me, that's the first I found out.

Q. No, I mean in 1950 you sent a wire——

A. I don't know.

Q. I showed you a copy of the wire.

A. I don't know; as I said, everything was sent to Ralph Bailey; he was taking care of it.

Q. You don't know to your own memory if you ever received that letter or not? A. No.

Mr. Cosgrave: Well, if the Court please, he has already been questioned on that.

The Court: Yes, he said he did not receive it.

Mr. Brand: O.K. I would like to offer at this time Exhibit 1 in evidence, it's already attached to the Complaint.

Mr. Cosgrave: We would object, your Honor, to the offer of that, there is no competency or relevancy here.

Mr. Brand: I will withdraw the offer for the time being.

(Testimony of Frank L. Smith.)

The Court: Very well.

Q. (By Mr. Brand): Mr. Smith, were you served with a copy of the Complaint in this matter on February 2nd of this year? Did you get a copy of the Complaint telling you to come into Court and defend this action in February of this year?

A. No. [14]

Q. I think the original file will show—

Mr. Cosgrave: We will stipulate that it was served by the Marshal's office; it was given to us.

Mr. Brand: Are you also stipulating that there was—a copy of the 1951 letter was attached to the Complaint?

Mr. Cosgrave: It was attached to the Complaint; there is no question about it.

Q. (By Mr. Brand): One more question, Mr. Smith. In the month or so after the Complaint was served upon you here, did you file any document in the Emergency Court of Appeals for the United States? A. Did I file?

Q. Yes.

A. No, I don't know what the attorneys did. Do you know? I don't know.

Mr. Cosgrave: The answer to that is no, Mr. Brand.

Mr. Brand: Your counsel has already answered the question, thank you.

The Witness: What?

Mr. Brand: Your attorneys have already informed me that you did not file a Complaint this year in the Court of Appeals.

(Testimony of Frank L. Smith.)

The Witness: This year?

Mr. Brand: Yes.

The Witness: I didn't file anything in this year, no.

Mr. Brand: No more questions, your Honor. [15]

The Court: Cross-examination?

Mr. Cosgrave: No questions, your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Brand: At this time, if the Court please, the plaintiff moves for a directed verdict on the ground that the defendant has not complied with the provisions of Emergency Price Control Act, Title 50, Section 924, providing that any plaintiff who receives a denial or partial denial of his protest may within 30 days after such denial file an appeal with the Emergency Court of Appeals. It appears that he has not done so on this case as regards any administrative or court appeal, and the regulations in this case are not subject to the question of this Court, and the United States is entitled to judgment.

The Court: The motion will be overruled at this stage.

Mr. Brand: Well, United States will stand upon the motion, your Honor.

The Court: Very well.

Mr. Brand: I am finished. The United States rests.

The Court: Very well.

Mr. Cosgrave: If we might have just a short recess, your Honor?

The Court: Very well.

(A short recess.) [16]

Mr. Cosgrave: May it please the Court, the defendant Frank L. Smith at this time, plaintiff having rested, moves for a directed verdict in his favor.

The Court: I wonder, Mr. Cosgrave, if we could hold that in abeyance for just a moment. I am going to look through these requests or admissions of fact.

Mr. Cosgrave: I am sorry.

The Court: By reason of the fact that we don't have a pre-trial order, I am just about to submit the matter on the pleadings as they stand.

Mr. Cosgrave: I beg your pardon?

The Court: I say inasmuch as we don't have a pretrial order, I am about to submit the matter on the pleadings.

Mr. Cosgrave: Well, your Honor, I have the defendant's contention here which might be attached to that draft.

The Court: Thank you.

Members of the Jury, I think you may take a recess. Make yourselves comfortable in the jury room.

(Whereupon, the jury was recessed.)

(The following proceedings were held out of the presence of the jury.)

The Court: Mr. Brand, I take it that there is none of the plaintiff's requests or admissions of fact

and answers thereto that you wish to read into the record?

Mr. Brand: No, your Honor, I am prepared to proceed [17] entirely upon, in effect, the stipulations of counsel.

The Court: Now, as I understand it, is it your—the defendant apparently denies throughout that he ever received the letter referred to as the letter of June 25, 1951, advising him in answer to his telegram?

Mr. Brand: He has denied receiving it, although he was provided with a copy.

The Court: Right. It's your contention that he can appeal that now?

Mr. Brand: No, your Honor, it is not. The O.P.A. provided that his opportunity to appeal in the Emergency Court of Appeals must be taken within 30 days from the denial. Now, in this case we believe we are able to assume that that means, although I am not positive, that means from the date of the receipt of the denial; that is the contention of the Government in this case; that even after he received it in February of this year, as attached to the Complaint, that he should have 30 days in which to file an appeal in the United States Court of Appeals; and not having done so, the United States is entitled to judgment. Now, on the basis and the thought that this matter would be before the Court purely as a matter of law, the United States has ordinarily made a practice of making a motion for a summary judgment in the event that

the verdict is directed in behalf of the defendant, then we will then try [18] for an order N.O.V. and proceed with the same questions of law.

The Court: All right. Mr. Cosgrave?

Mr. Cosgrave: At this time, may it please the Court, the defendant moves for a directed verdict in favor of the defendant upon the ground and for the reason that the plaintiff, as to the facts of the law, has shown no right to the relief demanded here; upon the further ground that, and specifically, that the plaintiff has failed to comply or to show a compliance with regulations under which plaintiff seeks to recover; and on the further ground that the plaintiff has failed to show a receipt of the notice by the defendant upon which the Government relies; on the ground that the defendant was denied a hearing with respect to this matter, and that the procedure which is claimed by the plaintiff to have been conclusive upon the defendant denied him due process of law in that there was no possibility of hearing whatsoever with respect to that, your Honor. Well, as a matter of fact, I think at this time there is nothing before the Court with respect to this letter except that it is in the Complaint, and perhaps that is sufficient if counsel wants to reoffer that letter.

The Court: Well, I think it was stipulated by counsel that he did receive it, but it might be just as well for you to mark that and make it a part of the record. Let's [19] do that after the jury gets back.

Mr. Cosgrave: Very well, but as I say, your

Honor, in the very statement in that letter, it shows on its face that there was no possibility of an appeal. In other words, the letter says that under the regulations, there was no right to hearing, that the decree of the Court was mandatory. In other words, there was no appeal here possible, because it was mandatory. That is the further ground, but here, your Honor, the failure in plaintiff's case, of course, is that they are relying on this notice being conclusive to the defendant. He didn't receive the notice. They are not able to prove he received the notice. They now come in, and it's a very brainy thought, I think, to come in and say, well, it referred to you when we sued you in the United States District Court for \$49,000, but of course, at that time here was an action or a suit pending in this court. I don't think that the Government can stultify its position by suing a party in the United States District Court for an amount of money and then come in on the trial of the case and say, well, you should have appealed from our Complaint to the Emergency Court of Appeals, and then you'd have been all right. If that is the Government's position, why then if it is their thinking that that could be done while this matter was pending in the United States District Court, why certainly we would want to go ahead and do it. [20] But today I think we are here on a matter of law, as far as the plaintiff's case is concerned.

I will just read to the Court, just as a matter of information, the statute on which they are relying here. As nearly as we can figure out, that provides

that within a reasonable time after the filing of any protest, but in any event not more than 30 days after such filing, the administrator should either approve or deny the protests, either by notice to the protester or hearing or provide an opportunity for presenting further evidence in connection therewith, and none of those things were ever done by the plaintiff here.

Mr. Brand: Well, the telegram shows that further evidence was submitted. The telegram that Smith sent.

The Court: I am sorry——

Mr. Brand: The telegram that Mr. Smith or his counsel sent in December, 1950, indicates a final protest and indicating that further information will be submitted at an early date. Whether it was or not, I don't know. The assumption which I go on is that the department, the R.F.C. received the letter, the telegram as they indicate in paragraph one of the letter of June 25, 1951. They indicated that the protest was denied and they state specifically that the only recourse is filing a Complaint in the Emergency Court of Appeals. Now, there is at least one case which [21] seems to suggest, and I will submit it to the Court along with my motion for judgment N.O.V. It would seem to suggest, if not the decree of the order, at least the denial of the order is the time from which the 30-day period runs. Under these circumstances, I am not prepared to argue about that.

The Court: Well, it seems to me that there is absolutely nothing here to submit to the jury, and I am somewhat concerned about the procedure. I think

that your suggestion is probably the best way to raise the legal question involved that I can think of, that we can discharge this jury by a verdict directed in favor of the defendant and then entertain your position and you can brief it up and I can take it as a matter of law. Do you have any thoughts about that?

Mr. Cosgrave: No, the only thought I had was that there was some testimony that we wanted to get in, but I guess if the matter were submitted on a verdict directed in our favor, we couldn't complain much about it. I would only wish to offer this one, I don't know whether—would you stipulate that that was received, that that was mailed? If not, we will have Mr. Smith testify to that.

Mr. Brand: We would object on the ground that it is irrelevant because the situation, the facts involved in the alleged violation of Control Order No. 1 are not before this Court and cannot be gone into, but I have no objection to the letter. [22]

The Court: Very well. Apparently you are just relying on the record without reviewing any of the facts of law?

Mr. Brand: That's right, your Honor.

The Court: I don't see what aid the letter would be then. Let me see the letter.

Mr. Cosgrave: Yes.

(Document handed to the Court.)

The Court: Well, I can see where it might possibly have some bearing, but you moved for a motion of directed verdict, and I am going to rule on it

one way or the other. Well, I will indicate to counsel when I call the jury back, I will direct them to enter a judgment in favor of the defendant and the Government can follow its own course along the lines that it was suggesting.

Mr. Brand: We will also ask this be introduced.

Mr. Cosgrave: Just in order to make the record complete; the Court won't receive it; if I can just offer it and maybe have it marked as a part of the record?

The Court: You may have it marked.

Mr. Brand: Did I understand the Court correctly, that it would like me to offer this Exhibit 1 in evidence when the jury is present?

The Court: That is the one that was attached to the copy?

Mr. Brand: That is correct. [23]

The Court: In connection with Plaintiff's Exhibit 1, which is a photostatic copy of the letter of May 25, 1951, when I call the jury back, will counsel stipulate that it's a copy of the letter which is attached to the Complaint which was received by the defendant personally?

Mr. Cosgrave: Yes, at the time he was served.

Mr. Brand: Yes, that's right. I think it's February 2nd, according to my records.

The Court: Let's see what the Marshal's return is. The Marshal's return is dated service on February 8th.

Mr. Cosgrave: Yes, we will stipulate that that is a copy of it.

The Court: Do we have a verdict form? I don't suppose we have the verdict form?

Mr. Brand: I am sorry, I didn't prepare one; it completely slipped my mind, I apologize.

The Court: Well, could you go up and have one of your girls prepare one?

Mr. Brand: Certainly. In order to clear the record, in connection with the Complaint, there was a typographical error which I think should be corrected. Paragraph V, Line 2, of Page 2, Line 15, a certification made June, July, August, 1955. It's a little late, but we ask that the words may be stricken.

Mr. Cosgrave: No objection. [24]

The Court: The months of what; what page?

Mr. Brand: Page 2, Paragraph V, Line 15. And we ask that it may be stricken.

The Court: Thank you, it will be stricken. Let's take a recess, then you prepare just a short verdict for the defendant against the plaintiff.

(A short recess.)

(Whereupon, document was marked Defendant's Exhibit Number 3 for identification.)

The Court: I will reverse the two motions that have already been made to allow the Government to reopen their case for the purpose of receiving Exhibit I. I understand that counsel will stipulate that Exhibit 1 is the true and correct copy of Exhibit A attached to the Complaint?

Mr. Cosgrave: It is, your Honor, yes.

The Court: Further that the defendant received a copy of the Complaint together with copies of

Exhibit 1, being Exhibit A to the Complaint, on February 8, 1956.

Mr. Cosgrave: At which time it was served upon him by the United States Marshal in connection with this case.

The Court: Let the record so show. Now, I understand the Government rests?

Mr. Brand: Yes.

The Court: In connection with the Government's motion [25] for directed verdict, it will be denied.

Members of the Jury, while you took your recess, counsel and Court had a conference and it's very obvious that this matter is going to be settled between the lawyer that is representing the Government and Mr. Smith, and as it has now developed through the stipulation of the parties that the facts are all agreed, so it resolves itself purely to a matter of law. So the procedure in the matter which the Court is going to take is to grant a motion for a directed verdict which the defendant has made and then by appropriate motion on the part of the Government this matter then will be submitted to the Court alone purely as a matter of law.

I think you are entitled to be advised as to what became of the case rather than being left up in midstream. The jury always wonders just what happened, and I wanted you to know.

Mr. Cosgrave: Your Honor, I just have one thing before the Court rules, with respect to the exhibit of the defendant which was marked.

The Court: If you are offering it, I will reject it. But it is a matter of the record.

Mr. Cosgrave: Very well, thank you.

The Court: So Mr. Brickell, for the purpose of this matter, I will appoint you foreman of this jury and instruct the jury that as a matter of law you are directed by the [26] Court to enter your verdict in favor of the defendant and against the plaintiff. So, Mr. Brickell, will you be good enough to sign the verdict? Would you date it while you have it there? Will the Clerk please read the verdict.

The Clerk: "United States of America vs. Frank L. Smith. Civil No. 8456. We, the jury, duly impaneled and sworn to try the above-entitled case under the direction of the Court do find our verdict in favor of the defendant and against the plaintiff. Signed Montie Brickell, Foreman. September 20, 1956."

The Court: Members of the Jury, the verdict will be received and filed. This concludes your services in connection with this case and on behalf of the Chief Judge McColloch and Judge Solomon, we thank you for your services and you will be discharged from further consideration of this matter and you may be excused until 10:00 o'clock Tuesday, October 2nd. Tuesday, October 2nd, please.

(Whereupon, the Court was adjourned.) [27]

Certificate

I, William A. Beam, do hereby certify that on September 20, 1956, I reported in stenotype the proceedings occurring in the foregoing matter; that I thereafter caused my said stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages 1 to 27, both inclusive, constitutes a full, true, and accurate transcript of said proceedings so reported by me in stenotype on said date, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 16th day of March, 1957.

/s/ WILLIAM A. BEAM.

[Endorsed]: Filed March 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Plaintiff's request for admission of facts and authenticity of documents; Answer to plaintiff's request for admission of facts and authenticity of documents; Verdict; Plaintiff's motion to set aside verdict and for judgment for plaintiff;

Judgment; Plaintiff's motion to set aside verdict, etc.; Order denying motion for judgment notwithstanding verdict and for new trial; Notice of appeal; Plaintiff's motion for extension of time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; Order to transmit exhibits; Transcript of docket entries, and Statement of points upon which appellee will rely, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8456, in which United States of America is the plaintiff and appellant and Frank L. Smith is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings. The exhibits will be forwarded at a later date.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of March, 1957.

[Seal]

R. DeMOTT,
Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15505. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank L. Smith, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: April 1, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15505

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK L. SMITH,

Defendant.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY UPON APPEAL

The plaintiff appellant, having filed its notice of appeal of the judgment of the District Court in the Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the record on appeal, does hereby file this statement of points upon which it intends to rely upon appeal:

1. In this action by the Government to recover meat subsidy payments determined to be due it by an order of the Reconstruction Finance Corporation dated June 25, 1951, the District Court erred in entering a final judgment on the merits in favor of appellee defendant on the basis of the Government's failure to prove appellee defendant's receipt of the order.

2. The Court erred in failing to grant plaintiff appellant's motion to set aside the verdict and for judgment for plaintiff.

3. The Court erred in failing to grant plaintiff appellant's motion for a new trial.

4. The District Court erred in failing to dismiss the action without prejudice to the government's right to make service of the order upon appellee defendant or to issue and serve a new order requiring reimbursement of the subsidy payments.

5. The District Court erred in failing to stay the proceedings with leave to defendant appellee to file a complaint in the Emergency Court of Appeals, challenging the validity of the order of June 25, 1951.

C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

I, Thomas B. Brand, Assistant U. S. Attorney for the District of Oregon, of Attorneys for Plaintiff, certify that I made service upon the defendant of the foregoing Statement of Points Upon Which Appellant Will Rely Upon Appeal, by depositing in the U. S. Post Office, Portland, Oregon, on April 11, 1957, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Walter J. Cosgrave, Esquire, Maguire, Shields, Morrison and Bailey, 723 Pittock Block, Portland 5, Oregon, Attorney of record for Defendant.

/s/ THOMAS B. BRAND,
Assistant United States
Attorney.

[Endorsed]: Filed April 13, 1957.

